United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2538

To be argued by
SAMUEL E. GATES

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-2538

HYMAN RADZANOWER,

Plaintiff-Appellant,

-against-

THE FIRST NATIONAL BANK OF BOSTON,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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PRELIMINARY STATEMENT

This brief is submitted by defendant-appellee ("defendant") The First National Bank of Boston (the "Bank"), in answer to the brief filed by plaintiff-appellant ("plaintiff") Hyman Radzanower, in support of his appeal from an Order, dated October 21, 1974, of the United States District Court for the Southern District of New York dismissing his action against the Bank. This Order was set forth in an Endorsement of the District Court (Hon. Lloyd F.

MacMahon), filed October 21, 1974, granting defendant's motion, pursuant to Fed. R. Civ. P. 12(b)(2) and (3) to dismiss this action on the ground of improper venue (A-56).*

Issue Presented

Did the Bank, which is established in Boston, Massachusetts, waive the venue provisions of section 94 of the National Bank Act by qualifying to engage in limited fiduciary activities in New York State?

Statutes Involved

The statutes involved in this appeal are set forth in an Appendix hereto.

Statement of the Case

Nature of This Action

This is an alleged class action in which jurisdiction is purportedly based upon the Securities Exchange Act of 1934, 15 U.S.C. § 78a, et seq. (the "Exchange Act") and upon the principles of pendent jurisdiction.

The complaint purports to assert claims against Teleprompter Corporation ("Teleprompter"), an issuer of

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* References prefixed "A" are to the Joint Appendix.

common stock traded on the New York Stock Exchange and registered pursuant to section 12 of the Exchange Act; Touche, Ross & Co., Teleprompter's independent auditors; twenty-two individuals who are or were officers and/or directors of Teleprompter; and the Bank, as agent bank for a $150 million Revolving Credit and Term Loan, dated as of April 26, 1973.

Plaintiff challenges the accuracy of various press releases, reports and financial statements issued by Teleprompter during 1973. It is alleged that each of the defendants "aided and abetted Teleprompter and the other defendants and/or joined and participated in one continuous course of conduct and plan of action" (A-25, ¶ 35), and failed adequately to disclose information with respect to certain financial difficulties allegedly being experienced by Teleprompter. Specifically, it is alleged that the Bank, as a lender to Teleprompter, had "fiduciary obligations to the investing public" to notify the Securities and Exchange Commission, the New York Stock Exchange, and the public generally of any financial difficulties Teleprompter allegedly might have experienced which had come to the attention of the Bank (A-26, ¶ 37).

Proceedings Below

The only proceedings in this action have been the filing and service of the complaint, and the filing of the

Bank's motion for an order dismissing the action as to it on the ground that venue in the Southern District of New York is improper because, under section 94 of the National Bank Act (12 U.S.C. § 94), an action against the Bank can be maintained only in the District of Massachusetts. This motion was heard before Honorable Lloyd F. MacMahon, and on October 21, 1974 Judge MacMahon filed an Endorsement granting the Bank's motion.

Statement of Facts

The Bank is a national banking association organized and existing under the laws of the United States. See 12 U.S.C. §§ 12-78 (1970). Section 94 of the National Bank Act requires that an action against the Bank be brought in the district court for the United States in which the Bank is established.

As shown by the affidavit of Philip A. Shaver, sworn to August 9, 1974, and the Exhibits thereto (A31-41), the Bank is established in the City of Boston, State of Massachusetts. The Bank maintains no office, facility, place of business or agent in the State of New York. Because the Bank is "established" in Boston, Massachusetts, this action can be maintained properly against it only in the District of Massachusetts.

On January 15, 1971, the Bank, as a foreign bank, qualified pursuant to section 131(3) of the New York Banking Law to perform certain limited fiduciary activities in New York with respect to the administration of trusts and estates. As required by section 131(3), the Bank filed with the Superintendent of Banks of the State of New York a Power of Attorney, dated January 15, 1971, which designated the Superintendent of Banks as the Bank's agent in New York upon whom process could be served in any action affecting or relating to an estate, trust or fund held by the Bank or represented by it. (A-47).* As expressly provided by section 131(3), this designation permitted the Bank to engage only in certain limited and specified fiduciary activities in New York.

ARGUMENT

I. THE CERTIFICATE FILED BY THE BANK WITH THE SUPERINTENDENT OF BANKS, PURSUANT TO SECTION 131(3) OF THE BANKING LAW, DID NOT CONSTITUTE A WAIVER OF THE VENUE PROVISIONS OF SECTION 94 OF THE NATIONAL BANK ACT.

It is not disputed by plaintiff that venue in this action with respect to the Bank is determined by section 94 of the National Bank Act. A national bank may waive the protection conferred by section 94, either by

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*The Power of Attorney filed by the Bank with the Superintendent of Banks is set forth in full at A-47.

an express waiver or by a failure to assert the privilege when such a bank is sued outside the district in which it is established. Michigan National Bank v. Robertson, 372 U.S. 591 (1963); First Charlotte National Bank v. Morgan, 131 U.S. 141 (1889).

The qualification of the Bank to perform certain limited fiduciary duties in connection with trusts and estates pursuant to section 131(3) of the New York Banking Law is not a waiver of the venue provisions of section 94 of the National Bank Act and a consent by the Bank to suit in New York State with respect to any and all matters arising out of its general commercial banking business conducted in Boston. See Buffum v. Chase National Bank, 192 F.2d 58 (7th Cir. 1951), cert. denied, 342 U.S. 944 (1952); Tuthill v. George S. May International Co., 285 N.Y.S.2d 317, 320 (Sup. Ct. Suffolk Co. 1967), aff'd, 296 N.Y.S.2d 1021 (1968).

The only issue raised by this appeal is whether the Bank, in complying with the provisions of section 131(3), waived the venue provisions of section 94. Plaintiff's sole and extremely formalistic claim is that the Bank expressly waived its right to be sued only in the District of Massachusetts because the Power of Attorney filed by the Bank did not duplicate precisely the language contained in section 131(3) of the New York Banking Law.

In Buffum v. Chase National Bank, supra, the United States Court of Appeals for the Seventh Circuit considered the issue of waiver of the provisions of section 94. That Court stated:

> Waiver is a voluntary and intentional relinquishment or abandonment of a known right or privilege, which, except for such waiver, would have been enjoyed * * * It may be expressed formally or it may be implied as a necessary consequence of the waiver's conduct inconsistent with an assertion of retention of the right. * * * It [the waiver] must be proved by the party relying on it. And if the only proof of intention to waive rests on what a party does or forbears to do, his act or omission to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible. [Emphasis added.] 192 F.2d at 60-61.

See Northeast Iron & Metal Co., Inc. v. Dobson & Johnson, Inc., 480 F.2d 798, 800 (5th Cir. 1973); Helco v. First National City Bank, 470 F.2d 883 (3d Cir. 1972); Prince v. Franklin National Bank, 310 N.Y.S.2d 390 (Sup. Ct. Nassau Co. 1970).*

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* In order to constitute a waiver of the venue provisions of section 94, the declaration or conduct relied upon must demonstrate a voluntary and intentional relinquishment of the privilege. The courts have held that doing business, even through a branch bank or wholly-owned subsidiary, in a foreign district (Helco v. First National City Bank, supra) or the commission of a tortious act in a foreign district (Northeast Iron & Metal Co., Inc. v. Dobson & Johnson, Inc., supra) are insufficient bases for finding a waiver of the venue provisions of section 94.

Plaintiff argues that the apparent failure of the Power of Attorney filed by the Bank to duplicate precisely the language contained in section 131(3) itself constitutes a waiver of the venue provisions of section 94 of the National Bank Act. This argument must fail because no requisite intent to waive this venue right can be implied from the language contained in the Power of Attorney filed by the Bank. The Bank has not voluntarily and knowingly relinquished its right to be sued in the District of Massachusetts except as to those activities which are within the scope of section 131(3). Plaintiff has clearly misconstrued the language contained in the documents transmitted by the Bank to the Superintendent of Banks and has ignored the specific purpose for filing such documents.

By the express terms of section 131(3), the designation of the Superintendent of Banks to receive service of process on behalf of the Bank is limited. The Bank only qualified to conduct limited fiduciary activities in New York, and consented to suit here only with respect to transactions arising from these limited activities.

It is clear from the Power of Attorney that it was filed "in conformity with section 131(3) of the New York Banking Law." (A-47). Moreover, the transmittal

letter forwarding the Power of Attorney to the Legal Division of the State of New York Banking Department plainly states that it was filed as required by section 131(3)(A-45). Judge MacMahon found the Power of Attorney "specifically evidences an intent to comply with § 131(c) [sic] of the New York Banking Law."

The scope of the Power of Attorney is not any broader than the Bank's authorization to do business in this State, i.e., to conduct limited fiduciary activities in New York. It is neither an unlimited qualification to transact business in New York State nor an unlimited designation of the Superintendent of Banks as agent upon whom process may be served.* It is limited in scope and relates only to the Bank's fiduciary actiities in New York State. The designation contained in the Power of Attorney of the Superintendent of Banks as the person upon whom service may be made must be read

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* Plaintiff is unrealistic in seeking to construe the Power of Attorney to be an unlimited designation of the Superintendent of Banks as agent upon whom process may be served. Section 200 of the New York Banking Law specifically exempts national banks from designating the Superintendent of Banks as agent for the service of process in connection with any commercial activities conducted in New York. Thus, it is evident that the Bank did not intend for its designation of the Superintendent of Banks to be unlimited.

in pari materia with the other provisions of the Power of Attorney and the purpose for which such designation was made.

As found by Judge MacMahon, the fact that the Power of Attorney may be "broad" does not negate an intent to comply only with the provisions of section 131(3). Importantly, the Power of Attorney, as filed by the Bank, is not " . . . manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right . . .".* Buffum v. Chase National Bank, supra. The Power of Attorney was filed in compliance with section 131(3) and is consistent with an intent to qualify to conduct limited fiduciary activities in New York. The scope of the Power of Attorney and the effect of filing it are clear and unmistakable.

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* Plaintiff suggests that a hearing may be necessary to determine if the Bank conducted any activities since January 15, 1971 in New York State that might establish an intent to relinquish the venue provisions of section 94. This suggestion is inappropriate and untimely. Plaintiff never requested such relief in the District Court. Furthermore, the record is bare of, and plaintiff cannot point to any activity engaged in by the Bank that manifests an intent to waive its clear right to be sued only in the District of Massachusetts. Plaintiff's suggestion must be rejected.

Conclusion

For the foregoing reasons, the Order of the District Court dismissing this action against The First National Bank of Boston should be affirmed.

Dated: New York, New York
February 24, 1975

Respectfully submitted,

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APPENDIX

New York Banking Law section 131(3) provides:

3. Except as otherwise provided in article five of this chapter,[3] no corporation other than a trust company shall have or exercise in this state the power of receiving deposits of money, securities or other personal property from any person or corporation in trust, or have or exercise in this state any of the powers specified in section one hundred of this article, or have or maintain an office in this state for the transaction of, or transact, directly or indirectly, any such or similar business, except that a federal reserve bank may exercise the powers conferred by subdivision one of such section if authorized so to do by the laws of the United States and any domestic corporation legally exercising any of the powers conferred by such subdivision at the time this act takes effect may continue to exercise such powers, and a foreign banking corporation or trust company incorporated under the laws of another state, which by the law of the state of its incorporation may act as trustee, guardian, executor, administrator, or in any other fiduciary capacity under any last will and testament or codicil thereto or other testamentary writing or under any deed of trust inter vivos or other written instrument establishing a trust, or by the appointment of any court of said state, may act in this state in any such fiduciary capacity, provided similar domestic corporations which have the power under the law of this state to act herein in any such fiduciary capacity, are permitted to act in like fiduciary capacity in the state where such foreign corporation has its domicile, provided that if such foreign corporation proposes to act in any fiduciary capacity in this state and to do so is required to file its qualification in the surrogate's court of this state, it shall file in the office of the clerk of the surrogate's court of the county in which application for such appointment is pending (a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing such clerk and his successors its true and lawful attorney, upon

whom all process in any action or proceeding against such fiduciary, affecting or relating to the estate, trust or fund represented or held by such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, and (b) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office; provided further that if such foreign corporation proposes to act in any other fiduciary capacity in the state, it shall file in the office of the superintendent (a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing the superintendent and his successors its true and lawful attorney, upon whom all process in any action or proceeding against [such fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund] may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, (b) a written certificate of designation, which may be changed from time to time thereafter by the filing of a new certificate of designation, specifying the name and address of the officer, agent, or other person to whom such process shall be forwarded by the superintendent, and (c) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office. (Citations omitted)

Section 94, of the National Banking Act, (12 U.S.C. § 94) provides:

Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.